

**Berkshire Farm Center and Services for Youth and
Beverly E. Grochan. Case 3–CA–19647**

February 22, 2001

DECISION AND ORDER

**BY MEMBERS LIEBMAN, HURTGEN, AND
WALSH**

On January 31, 1997, Administrative Law Judge C. Richard Miserendino issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed exceptions, a supporting brief, and a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.

The judge concluded that the Respondent had violated Section 8(a)(3) by laying off employee Beverly Grochan and refusing to consider her for recall. He further concluded that Grochan had forfeited her right to the traditional remedies of reinstatement and backpay by engaging in misconduct with respect to obtaining confidential information.

When an employee is unlawfully discharged, reinstatement and backpay are appropriate remedies unless the employer can show subsequent conduct, or discovery of conduct, that would have resulted in a lawful discharge. Under well-established Board precedent, if an employer establishes that an employee engaged in misconduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct. *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993); *John Cuneo, Inc.*, 298 NLRB 856–857 (1990). In finding that Grochan engaged in misconduct, the judge did not apply this standard; he simply made findings of fact concerning Grochan's conduct and concluded that because of this conduct she was not entitled to reinstatement or backpay.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The judge incorrectly concluded that Grochan forfeited all right to backpay. The evidence showed that the Respondent did not become aware of Grochan's misconduct until the trial. Even if the Respondent establishes that the conduct warrants forfeiture of reinstatement and

In these circumstances, we have decided to leave resolution of this issue to compliance, where the Respondent, if it wishes to establish that Grochan is not entitled to reinstatement and her backpay must be limited, will have the burden of establishing that she engaged in misconduct for which it would have discharged any employee. Accordingly, we shall modify the judge's recommended Order to include reinstatement and backpay.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Berkshire Farm Center and Services for Youth, Canaan, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against any employees because of their union or protected activity and support for Local 200-D, Service Employees International Union, AFL–CIO, CLC, or any other union.

(b) Refusing to consider for employment any employees because of their union or protected activity and support for Local 200-D, Service Employees International Union, AFL–CIO, CLC, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Beverly E. Grochan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Beverly E. Grochan whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff and refusal to consider for employment, and within 3 days thereafter notify Beverly E. Grochan in writing that this has been done and that the layoff and the refusal to consider her for employment will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all

backpay, backpay would still be awarded from the date of the unfair labor practice to the date that the misconduct was discovered. *John Cuneo, Inc.*, *supra*; *Axelson, Inc.*, 285 NLRB 862 (1987).

other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Canaan, New York facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 3, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT layoff or otherwise discriminate against any of you for supporting Local 200-D, Service Employees International Union, AFL-CIO, CLC, or any other union.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to consider for employment or otherwise discriminate against any of you for supporting Local 200-D, Service Employees International Union, AFL-CIO, CLC, or any other union.

WE WILL NOT layoff or refuse to consider for employment or otherwise interfere with, restrain, or coerce Beverly E. Grochan or any other employee, for engaging in union or other protected concerted activities for mutual aid or protection of employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Beverly E. Grochan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Beverly E. Grochan whole for any loss of earnings and other benefits resulting from her layoff and the refusal to consider her for employment, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful layoff and refusal to consider for employment of Beverly E. Grochan and, WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the layoff and refusal to consider her for employment will not be used against her in any way.

BERKSHIRE FARM CENTER AND SERVICES FOR YOUTH

Alfred M. Norek, Esq., for the General Counsel.

E. Michael Ruberti, Esq., of Albany, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Albany, New York, on September 16-19, 1996. The charge was filed on October 3, 1995. The complaint, which was issued March 6, 1996, alleges that on September 30, 1995, the Respondent laid off individual Charging Party, Beverly E. Grochan, and subsequently refused to consider her for job openings in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

Grochan was an active assistant shop steward who had filed several grievances, many on her own behalf, and had consistently urged the bargaining unit employees to join and become active in the union. In July 1995, the Respondent restructured its operations. Grochan was one of two people in the bargaining unit who was laid off. Her unsuccessful attempts to obtain another job with the Respondent resulted in the filing of the underlying charge.

The Respondent contends that the restructuring and resultant layoffs were necessitated by reduced funding and a more competitive foster care environment. It asserts that Grochan was not selected for another job with the Respondent because she was not qualified.

The primary issues are (1) whether the Respondent's adverse actions were motivated by protected conduct, (2) if so, whether the Respondent would have taken the same actions even in the absence of the protected conduct, and (3) if not, whether Grochan engaged in dishonest conduct during her employment which would preclude remedial relief.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a not-for-profit New York corporation, headquartered in Canaan, New York, with offices in the major cities of Buffalo, Rochester, Syracuse, Schenectady, Melville, and Long Island, New York. It provides foster care services for male youths through a residential program and school on the Canaan Campus, along with substance abuse outpatient and support services. It also operates a foster family boarding home program and foster care services for male youths and families in various parts of New York State. In the normal course and conduct of its business operations, the Respondent annually purchases and receives goods and products valued in excess of \$50,000 directly from suppliers located outside of New York State. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union, Local 200-D, Service Employees' International Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Operative Facts

Charging Party, Beverly E. Grochan, began working for the Respondent on November 1, 1991, as a switchboard operator in the Respondent's administration building. She worked 29 hours per week, Friday–Monday. Her annual evaluations were uniformly good resulting in annual wages increases. In November 1992, Grochan was described by her supervisor, Diane Conley, as a person who “completed all tasks thoroughly, timely and pleasantly,” who was “always ready to assist in coming up with new ideas and new ways of doing things,” and who was “careful to be considerate of her co-workers’ feelings and habits.”

In July 1993, supervisory responsibility for the switchboard was transferred to Sherry Gallup,¹ a supervisor for secretarial services in Gilpin Hall. In addition to her secretarial supervi-

sory duties, Gallup began supervising three 30-hour switchboard operators, including Grochan and Leona Scarpinato, and approximately six–eight full-time secretaries, who earned overtime working as part-time switchboard operators. In November 1993, Grochan received her first annual evaluation from Gallup, who described Grochan as “always willing to go the ‘extra’ to make sure things run smoothly,” a “very reliable, dependable” person, who is “proactive, which is an asset to her position as things tend to become challenging at times.” Up until then, Gallup's experience with Grochan had been “positive.”

In January 1994, Grochan applied for a grade 3, residential secretary position in Gilpin Hall, under Gallup's supervision. This was a 40-hour per week position, Monday–Friday, 8:30 a.m.–4:30 p.m. She was interviewed by Gallup, who explained the job duties to Grochan.² Gallup told Grochan to think things over and to let her know if she was still interested in the position.³ After discussing the job with her husband, Grochan decided against changing jobs primarily because she would have to make day care arrangements in the afternoon for her daugh-

² The recollections of Gallup and Grochan differ as to what was actually discussed. Gallup testified that she told Grochan that the secretarial pool was a pressured environment at times which required everyone to work as a team. According to Gallup, Grochan responded negatively to this statement by saying that the Respondent was not a team oriented agency and that she, Grochan, was not a team player. Grochan denied any discussion using the terms “team play.” She further denied ever saying that she was not a team player. Rather, she recalled being told that everyone worked in a group together and helped each other. When Gallup asked whether she had any concerns about working in the secretarial pool, Grochan stated, “No.” I credit Grochan's recollection of what was discussed. There is no evidence that she manifested a poor attitude or inability to work with other people at any time prior to the interview. Rather, her prior evaluations as noted above reflect the opposite. Moreover, I am persuaded by Grochan's credible explanation that working together with other people under pressure would not have made any difference to her because as a switchboard operator she often worked under pressure, sharing a work area with two other people, to ensure continuity between shifts.

Gallup also testified that at this February 1994 interview, she did not give Grochan a typing test because Grochan was too tired to take the test after having worked all day. Aside from that, there was no discussion at all of Grochan's typing abilities. Gallup asserted that she relied on the results of an earlier test that she gave to Grochan in April 1991, when Grochan initially applied for a job with Respondent. According to Gallup, Grochan did not perform “up to snuff” on this earlier test. Grochan did not recall applying for a secretarial job in 1991. She also was adamant that she took a typing test in February 1994, although she did not know how well she performed. I credit Grochan's testimony to the extent that she took a typing test in February 1994. It was Gallup's practice to give such a test as part of the interview process and it would have made little sense for Gallup not to test Grochan's typing skills, if she truly had performed poorly in 1991. On the other hand, the evidence establishes, and I find, that Grochan applied for a secretarial position in April 1991.

³ Grochan left the interview believing that the job was hers, if she wanted it. Gallup denied offering the job to Grochan. The truth probably lies somewhere in between. Given Gallup's comment to Grochan to go home and think it over and the fact that Gallup did not question Grochan's typing ability, it is understandable that Grochan left with the impression that the job was hers.

¹ Before she married in 1994, Gallup's surname was “Chittendon.” Throughout this decision she will be referred to as “Gallup,” even though some of the documentary evidence reflects her maiden name, “Chittendon.”

ter. She phoned Gallup the next day withdrawing her name from consideration, but not without first receiving Gallup's assurance that she would not be precluded from consideration for any future openings.

1. The February 14, 1994 meeting

One of the ways in which Gallup encouraged communication with the switchboard operators was through monthly meetings. An agenda would be established by Gallup with input from the operators on topics of concern. Among the topics discussed as early as December 1993, was the timely relief of switchboard operators at the end of their shifts. In particular, the second-shift operators had been reminded to be prompt in reporting to work so that the day shift operators could leave on time. Lee Scarpinato, the most senior switchboard operator, was among the offenders. She had been late on three or four occasions, prompting Grochan to say something to Scarpinato, as well as to Gallup. Unconvinced that the matter had been resolved, Grochan called Gallup at home one night in mid-February 1994 to complain about Scarpinato arriving late for work. She also felt that Scarpinato was not sharing the workload equally.

The phone call prompted Gallup to hold a meeting the next day, February 14, 1994, with Grochan and Scarpinato ostensibly to clear the air. Although Scarpinato was not above reproach, Gallup apparently was irked because she felt that Grochan had failed to address the problem in an appropriate manner. In Gallup's view, Grochan had complained too much to others about Scarpinato, rather than dealing directly with Scarpinato. Gallup was also upset because Grochan left little notes at the switchboard highlighting Scarpinato's oversights.

The unannounced meeting took Grochan by surprise. She attended reluctantly. Several different opinions were exchanged in the lengthy meeting. In the presence of Scarpinato, Gallup pointed out to Grochan that everyone makes mistakes, that everyone needs to work together, and that publicly criticizing a co-worker is counterproductive. Grochan reacted with dismay. Although it was Scarpinato who was not arriving on time and, in Grochan's view, was not sharing the work equally, the meeting somehow focused on how she handled the problem.

On the following day, February 15, Gallup sent Grochan and Scarpinato a memorandum which memorialized what transpired at the meeting. A copy also was placed in Grochan's personnel file. This was the first time Grochan had received a less than positive written assessment as an employee of the Respondent. The very next day, February 16, Grochan joined the Union, Local 200-D, Service Employees' International Union, AFL-CIO, CLC.

2. The Grievance filing activity

Grochan soon realized that the grievance procedure under the collective-bargaining agreement was a quick and efficient method for resolving any problems that developed with her supervisor. Not more than 3 weeks after joining the Union, Grochan filed two grievances, both of which were resolved in her favor. The first was precipitated by a request made by Gro-

chan to Gallup on February 18, to review her personnel file.⁴ According to Gallup, she called the personnel department the same afternoon, but no one ever got back to her. Gallup therefore never got back to Grochan. After waiting 2 weeks, Grochan filed a grievance on March 4, 1994, seeking to review her personnel file, which was promptly provided on March 9.

The second grievance came about after Grochan was asked by Assistant Supervisor Ann Nieber to sign a form stating that Grochan had taken seven unplanned absences. Apparently unbeknownst to Nieber, the absences were all planned and previously approved by Gallup. Grochan filed a grievance on March 4, 1994. Two other similarly affected employees, Darlene Messina and Shirley Royce, also filed grievances. The use of the unplanned absence forms was suspended and all of the grievances (Grochan, Messina, and Royce) were resolved by referring the matter to a labor-management committee.

Over the next several months, Grochan filed several grievances. In every instance her grievance was upheld in her favor by upper management.⁵ One such grievance was prompted by a memo Grochan received from Gallup telling her that she was "overstepping the bounds" of a switchboard operator. Grochan had received a phone call from someone seeking information about a job opening at the Respondent. Although Grochan attempted to route the call to someone who could answer the caller's questions, the call kept coming back to the switchboard because no one was available to take the call. The caller did not want to leave a voice message. Grochan wrote a memo to Gallup which explained what had occurred and presented the question of whether a backup system was desirable for important offices to take important calls. Gallup took offense to the memo and wrote back to Grochan stating that she was "overstepping the bounds" of a switchboard operator. Gallup also criticized Grochan for rerouting the call.

Grochan felt that she had been unfairly reprimanded and filed a grievance on August 11, 1994. In her view, she was only asking for supervision and direction in dealing with what she perceived to be a problem. The relief she sought was a logical policy or procedure for handling these types of phone calls. The grievance was resolved with the agreement that the issue would be discussed at the next switchboard operators meeting.

A few days after Grochan filed that grievance, Gallup posted an overtime sheet soliciting volunteers for overtime in September and October.⁶ Grochan listed in writing the shifts and days

⁴ Grochan initially had gone to the personnel department to review her file, where she was told that the policy was to make a request through a supervisor.

⁵ Respondent asserts that the resolution of these grievances in Grochan's favor reflects a cooperative rapport that it had with the union and negates any inference of union animus. I am not so persuaded. The reasons are many for settling grievances, but usually not among them is a willingness to simply get along. If anything, the evidence supports an inference that upper management believed there was merit to Grochan's concerns.

⁶ Switchboard operators could work extra hours by volunteering for overtime. The supervisor would publish a list of shifts that required coverage due to vacation or illness. The operators would make known their availability to work certain hours. Shifts would be assigned on a rotating basis by seniority.

she would be willing to work. When she did not receive the hours that she requested, Grochan filed a grievance, claiming that Gallup did not assign the hours in accordance with the collective-bargaining agreement. The grievance was eventually resolved when upper management acknowledged in writing that it would comply with the intent of the collective-bargaining agreement and compensate Grochan for any past omissions by making overtime available to her in the future. In effect she was to be offered three turns of overtime.

Implementing the resolution of Grochan's overtime grievance immediately became problematic for Gallup. Upon learning that Grochan would receive future turns of overtime, Scarpinato filed her own grievance asserting that the accommodation made to Grochan violated the contract because the three turns would not be made on a rotating basis. Scarpinato insisted that all overtime be assigned on a rotating basis as required by the contract. In addition, the personnel department had to establish a procedure for allotting overtime offered on a holiday or vacation day. This occurred after Grochan lost a turn when she was granted a deferred holiday and then was called to work on another shift the same day. One of Grochan's turns therefore was restored.

In late January 1995, Gallup attempted to bring closure to the three turn accommodation. She reported to her supervisor, Al Hammerling, that although she had offered Grochan additional hours on 43 occasions as of January 30, 1995, Grochan had accepted the overtime only once. Grochan objected to ending the accommodation before she got her three turns. She responded that she had been offered overtime on days for which she had not volunteered, including deferred holidays and vacation. Only after Harold Novick, the Respondent's executive director, became involved was the matter finally resolved.

In the meantime, Grochan filed another grievance on September 22, 1994, which was pursued through the grievance procedure at the same time as the overtime grievance. It arose after Grochan was denied the use of family sick leave to stay home with her husband, who was involved in an automobile accident. After Gallup unsuccessfully attempted to find someone to cover the shift, she called Grochan telling her that there was no one to cover for her. Although Grochan reported to work, she grieved the matter. The grievance was resolved by upper management, who acknowledged that Grochan had the contractual right to use her sick leave and that it was management's responsibility to find coverage for the switchboard responsibilities.

3. The November 1994 annual evaluation

In November 1994, Grochan received her annual evaluation from Gallup, which began by stating:

I began supervising Beverly Grochan in July 1993. Throughout this period a number of concerns, which led to grievances were raised by Beverly over assignment of overtime, family sick leave coverage and concern over items in her Personnel file. I find it very frustrating that to this point we have not been able to establish the type of communication needed between supervisor and supervisee to prevent some of the previously mentioned disagreements from escalating into angry confrontations.

It also stated that "[i]t is imperative that Beverly come to me first with problems as they arise so that perhaps they can be solved without involving other departments or Agency personnel."

Grochan read the evaluation and met the same day with two union representatives, Sally McShane and David Patrick. The three agreed that her grievances should not be discussed in her annual evaluation, since they had no relationship to her job performance. A meeting was arranged with Gallup, Hammerling, Joe Arkins (the Respondent's personnel manager), McShane, and Grochan. It was pointed out that Grochan's union activity did not have anything to do with the evaluation and that the grievances she filed should not be included in the evaluation. After Gallup agreed to rewrite the evaluation, a second draft was given to Grochan which merely deleted the words "led to grievances," as well as the sentence beginning with "I find it frustrating." Everything else remained unchanged. Grochan refused to accept or to sign the second draft. A second meeting was held during which Grochan was given a third draft, which deleted all references to overtime, family sick leave, etc. Grochan signed the third draft, but insisted on attaching a handwritten note to the evaluation stating that she did not believe that it met the criteria set forth in the employee handbook.

4. The Respondent's restructuring

On February 27, 1995, Rose Washington became the Respondent's executive director. When she arrived, the Respondent was undergoing a fairly extensive self-evaluation prompted by federally proposed block grant funding for States, as well as the implementation of a managed care approach for foster care services. James White, associate director, was the Respondent's chief financial officer, responsible for budget preparation, financial reporting and auditing. In March 1995, he discussed the anticipated changes with Rose Washington, advising her that there might be a 10-percent reduction in funding which would reduce the foster care program budget by \$1.3 million. White also cautioned that in order to operate in a more competitive managed care environment, the Respondent would have to restructure, which included hiring new people in various positions to help with program development. In short, White told Washington that the Respondent would have to tighten its belt and restructure itself in order to get ready for the days ahead.

Despite Gallup's earlier admonishment that Grochan work through her before speaking to anyone outside their department, Grochan approached Rose Washington in mid-March 1995,⁷ ostensibly about meeting to discuss some "personal matters."

⁷ The Respondent argues that Washington did not know that Grochan was a union official or that she was acting on behalf of anyone other than herself. Grochan testified that she introduced herself to Washington as the assistant shop steward when she requested the meeting. Washington denied that Grochan mentioned anything about her union status or the Union. Whether Grochan did or did not mention that she was an assistant shop steward when she first introduced herself is not terribly significant. She later filed a grievance on this matter, which on its face established that it was filed on behalf of all switchboard operators. Grochan signed the grievance as assistant shop

In reality, Grochan wanted to discuss a bathroom break procedure, put into effect by Gallup, that the switchboard operators had to follow. Although Washington had been in her new position less than a month, she agreed to meet with Grochan. The meeting, however, was postponed several times between early March and mid-May 1995, because of Washington's busy schedule. Eventually Grochan filed a grievance on May 8, 1995, asserting that the bathroom break procedure was degrading and humiliating. The grievance was denied at step I by Gallup and at step II by her supervisor, Al Hammerling. On May 12, 1995, Grochan submitted the grievance to step III. Before a grievance meeting could be held at this level, Grochan approached Washington again about having the meeting which originally was scheduled for March.

5. The May 19, 1995 meeting with Rose Washington

The two met the following day, May 19, 1995, at which time Washington agreed that the bathroom break procedure was uncalled for. She told Grochan that in the future when the operators wanted to take a bathroom break, they needed only to switch the telephones to the infirmary without explanation. After Grochan left the meeting, Washington instructed the switchboard operator on duty, Lee Scarpinato, to write in the operators notebook that when they needed to go to the bathroom they were simply to switch the telephones to the infirmary without explanation. Grochan effectively had circumvented the grievance procedure. She went right to the top by convincing Rose Washington, the new executive director, to rescind a procedure that affected all switchboard operators: a procedure that had been put into effect by Gallup and supported by upper management at each step of the grievance procedure.

6. Grochan's increasing union involvement

In mid-May 1995, Grochan was elected chief shop steward for the entire bargaining unit, effective September 1, 1995. She also became a member of the Union's collective-bargaining team as Local 200-D and the Respondent began negotiating a new collective-bargaining agreement to replace the one due to expire on June 30, 1995. That contract was extended to July 20, when a tentative agreement was reached. The tentative agreement was rejected by the membership on August 9, 1995. However, a new collective-bargaining agreement eventually was ratified and signed. Grochan participated in the negotiating sessions. James White, Respondent's associate director and chief financial officer, also participated in the negotiations as the Respondent's chief spokesperson.

Prior to May, White had little contact with Grochan, other than to say "hello" and "good-bye" as he passed by the switchboard on his way to and from his office. In early June, the switchboard was placed under White's departmental supervision, which meant that Gallup reported to him, and Grochan reported to Gallup. In early July, White was promoted to Deputy executive director. At the same time, he began considering the possibility of abolishing the switchboard as a cost saving

steward and Washington signed off on the grievance at step III, which constructively placed her on notice that Grochan was a union official.

measure.⁸ White prepared a cost analysis containing three scenarios for replacing the switchboard. One scenario provided for two regular switchboard operators and a voice mail system. Another scenario provided for a 40-hour receptionist with an automated attendant. The last scenario provided for two 30-hour receptionists with an automated attendant.

While he was developing these cost savings scenarios, White received a report that Grochan was aggressively encouraging employees to join the union, become active in its affairs, and to utilize the grievance procedure. Similar reports had been received by Gallup. On July 28, 1995, White prepared a letter to Grochan which stated that it had come to his attention that she was conducting union business during working time.⁹ In addition, the letter stated that employees had complained of being "harassed" by Grochan to join the Union.¹⁰ White warned Grochan that the Respondent would not tolerate this activity during working hours and that it must be discontinued immediately. Copies of the letter were inserted into envelopes addressed to several management personnel, including Rose Washington, and were placed in the intradepartmental mail. The copy addressed to Grochan, however, was not sent to her upon the advice of Respondent's attorney. Grochan nevertheless managed to obtain and read a copy of the letter.¹¹

7. The decision to eliminate the switchboard and to lay off Grochan

In the meantime, White concluded that the switchboard operation should be replaced by a 40-hour-per-week receptionist and an automated attendant. He recommended that action to Rose Washington, who concurred. All of the switchboard operator positions were eliminated. Scarpinato, the most senior switchboard operator, was offered the newly created receptionist position. Of the three regular switchboard operators, Grochan was the only one who would be laid off.¹² By letter, dated August 16, 1995, she was advised that her position had been

⁸ Respondent had leased a voice mail system 1 year earlier, which was capable of being integrated with an automated attendant. Respondent also had the option of purchasing the leased voice mail system.

⁹ The Respondent did not have a rule prohibiting such activity. Grochan's un rebutted testimony establishes that it was not unusual for her to discuss union business with employees who passed through the reception area in the administration building. Sometimes she initiated the conversation, sometimes it was the other person. The Respondent had never warned her against doing so.

¹⁰ There is no probative evidence that Grochan coerced or harassed any employee to join the Union.

¹¹ Respondent was unaware that Grochan had seen or even knew about the letter until the investigation of the subject charge, when Grochan alerted the General Counsel that the letter existed. At the trial, Grochan testified that while sitting at the switchboard, she held one of the envelopes up to the window light and read its contents. I do not credit her testimony on this point. Respondent amply demonstrated that it was not possible for Grochan to read the letter without opening an envelope.

¹² The other 30-hour switchboard operator was Betty Banker. In July 1995, she applied and was selected for a secretary's position in White's office, where she began working on August 28, 1995. Banker, who had less seniority than Grochan, was not adversely affected by the elimination of her switchboard operator position.

eliminated and that she would be laid off, effective September 30, 1995.¹³

The restructuring had minimal impact on the rest of the bargaining unit. Two full-time recreation workers, Dean Pope and Douglas Snyder, who planned to resign anyway to return to school, were voluntarily laid off. A maintenance worker position held by James Maselli was eliminated; however, he was rehired as head custodian. Two part-time recreation workers, Martin G. Schmitt and Gay T. Gemello, who were supposed to be laid off, were given other jobs with the Respondent. A vacant .6 FTE food service worker position was eliminated; however, a new food service position, institutional aide, was created and was filled by someone hired from outside the Respondent. The only person actually laid off other than Grochan, was Paul Ryan, a groundsman.

Grochan's last day of work was September 29, 1995. She reviewed her personnel file shortly before leaving the Respondent's employment. Five days later, on October 4, 1995, Gallup completed a termination report, which was placed in Grochan's personnel file. Gallup evaluated Grochan as "fair" in attendance and initiative, "good" in job knowledge and quality of work, and "poor" in cooperation. Notably, Gallup reflected that she would not rehire Grochan in the same position or in another position. In addition, Gallup wrote that she "found Beverly very difficult to work with. Not an agency employee—a strong 'me' person." The following day, John Muir, a Local 200-D representative, notified the Respondent that Grochan was interested in returning to work. He sent James White a letter stating that Grochan wanted to exercise her bumping rights under the collective-bargaining agreement to bump to any job for which she had the seniority and qualifications.

8. The subsequent attempts to be rehired

Grochan applied for three jobs subsequent to her layoff. She first applied for a grade 5, senior secretary position in the outpatient department. Eight individuals applied for the position. James R. Morgan, acting director at the time, was responsible for reviewing the applications and conducting interviews. He credibly testified that the department was expanding and therefore a secretary was needed for two recovery cottages: Haight and Quamly. He was looking for someone with computer skills, who was very familiar with DDS documentation, court letters, and uniform case reviews. Morgan interviewed five out of the eight applicants. Grochan was not among those interviewed because her application reflected mostly bookkeeping

and switchboard operator experience with no work experience in the cottages. All of the applicants interviewed had performed secretarial work in a cottage and had typed reports to the State. Morgan selected Vicki Pinori, a grade 3, secretary, because she had secretarial experience within the cottages and was familiar with the documentation.¹⁴ Morgan also knew her personally as a strong worker. By letter, dated November 3, 1995, he thanked Grochan for her interest, advised her that Vicki Pinori had been selected and explained why Pinori had been chosen.

Grochan next applied for a grade 3, residential secretary position under Gallup's supervision in Gilpin Hall. It was the same position she had applied for in April 1991 and January 1994. Gallup testified that she did not interview Grochan because she had interviewed her on two prior occasions and did not believe it was necessary. Gallup stated, "I didn't feel she'd work out well with an office of thirteen women working together the way we were, and I just felt it would be a waste of time to bring her in and interview her again when I had someone who was more qualified." Gallup further explained that she did not believe Grochan could work with a group "[b]ecause I felt she wasn't a team player."

The person selected by Gallup for the job was Betty Banker, the other regular switchboard operator, who had less seniority than Grochan. As noted earlier, Banker began working as a grade 11, secretary in White's office in late August 1995. Although a grade 11 salary is several grades higher than a grade 3 salary, Banker applied for and was selected by Gallup for a grade 3, residential secretary job in November 1995. According to Gallup, Banker was selected because she had worked for White and "she did very extremely well on her typing test." On December 4, 1995, Local 200-D filed a grievance demanding that the Respondent recall Grochan to the grade 3, secretary position which was filled by Banker.¹⁵

In February 1996, a few months after Betty Banker was selected for the grade 3, residential secretary position, Gallup prepared a memo which recited Grochan's prounion activity as Gallup came to know it from the other secretaries. According to Gallup's memo, Grochan engaged in the following prounion acts:

She called one secretary and said she was "pissed-off" because the secretaries had no involvement in the Union. No wonder the Agency was such an awful place to work. If the

¹³ Subsequent to being notified that she would be laid off, Grochan wrote two letters to the Respondent's board of directors: one on September 14, 1995, and the other on January 24, 1996. In these letters, Grochan lashed out at Rose Washington and other management officials, making certain allegations, and attributing certain actions to them, most of which were untrue. The Respondent argues that the letter writing was not protected activity and therefore Grochan has no right to reemployment. The argument makes little sense. In the first place, the Respondent does not contend that it refused to consider Grochan for rehire because she wrote the two letters. Therefore, an underlying premise for the argument does not exist. In the second place, the General Counsel has not argued, nor do I find, that the letter writing was protected activity.

¹⁴ All recommendations were subject to final approval by Rose Washington, executive director.

¹⁵ The General Counsel introduced, without any objection from Respondent, correspondence exchanged between John Muir, vice president of Local Union 200-D and James White, deputy executive director, concerning offers to settle the grievance. There was also considerable testimony on the same topic presented by both sides without objection. Summarized the evidence shows that the Respondent purportedly offered to create a 30-hour-per-week receptionist position for Grochan, which was not communicated to her union representative, John Muir. The Respondent argues that the offer establishes its willingness to consider Grochan for rehire, thereby negating any inference of animus. I do not agree. It is elementary that litigants attempt to settle grievances for a wide variety of reasons, including the belief that they can limit their liability exposure.

Union had more support from the secretarial staff, perhaps things would change at the Agency.

One Secretary had a problem, and when casually talking about it at Administration, Beverly insisted that she file a grievance. That secretary stated that grievances were not her style, and Beverly argued that grievances are the only way anyone could expect anything to be done around here, because nobody listens. This was also during work hours, and an argument ensued, making the secretary very uncomfortable.

Another secretary was badgered because she did not attend union meetings, this also was done during work hours on the telephone.

Most of the secretaries were constantly harassed about joining the Union, even after stating they had no interest in union activities.

I did speak personally with one employee, while visiting my sister who has terminal cancer. This employee was in tears after a confrontation with Beverly. The whole ordeal was very traumatic for this woman. She said Beverly had called her at her place of employment, and went off on a tangent and was verbally abusive throughout the conversation regarding the terrible working environment and about the non-support of employees at the Agency for union activities. This conversation lasted about 15 minutes during working hours.

Grochan made one last application on March 6, 1996, for a grade 12, secretary/administrative assistant position in the human resources department.

She received no response to this application from Yvette Malave, the new human resources director. After that, Grochan stopped applying for jobs with Respondent because "she had given up." In June 1996, another grade 3, residential secretary position under Gallup was filled with a person from outside the Respondent. Grochan did not know of the opening and did not apply.

B. Analysis and Findings

Section 8(a)(3) of the Act prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.¹⁶ Specifically, the General Counsel must establish protected activity, knowledge, animus or hostility, and adverse action which tends to encourage or discourage protected activity.¹⁷ *Farmer*

Bros. Co., 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity. *T & J Trucking Co.*, 316 NLRB 771 (1995).

1. The knowledge of protected activity and related animus

James White, Respondent's deputy executive director, clearly was aware of Grochan's protected activity. As the Respondent's principal negotiator, he sat in collective-bargaining negotiations with Grochan from mid-May through the end of July 1995 during which time Grochan was elected to be chief shop steward of the bargaining unit, effective September 1, 1995.¹⁸ In early July 1995, when he was contemplating different scenarios for replacing the switchboard function, White received a report that Grochan had admonished an employee for not joining the Union. Grochan, among other things, purportedly told the employee that if it ever became necessary she would picket the front gate.

As Grochan's union activity crescendoed, White reacted with a warning letter to her, dated July 28, 1995. The letter asserted that Grochan had been conducting union business during working time. It stated that employees had complained about being harassed by Grochan during working hours to join the Union. It also stated, in the penultimate paragraph, that "[t]his is a warning that Berkshire Farm will not tolerate this activity or behavior during working hours. This must be discontinued immediately." The Respondent did not have a rule prohibiting union activity during working time or working hours nor is there any probative evidence that Grochan coerced or harassed any employees. Even though White refrained from giving the warning letter to Grochan, it nonetheless reflects his state of mind at a crucial point in time when he, as the chief engineer of the reorganization, was contemplating whether to replace the switchboard with one or two receptionists.¹⁹ The warning letter supports an inference of animus as does the fact

and requested that the case be deferred under *Collyer Insulated Wire*, 192 NLRB 837 (1971). The General Counsel opposed the motion, which I denied, by Order, dated October 25, 1996. I reaffirm my ruling for the reasons stated therein.

¹⁸ White testified that he was unaware that Grochan was assistant shop steward or that she was elected to be chief shop steward. I do not credit his testimony in this respect. White impressed me as a savvy individual who wore many hats for the Respondent. He was its chief financial officer, chief engineer of the reorganization, and chief negotiator. He also was Grochan's indirect supervisor as of June 1995. His office was located in the administration building, where the switchboard was located and where Grochan worked. He passed by Grochan every day to get to his office. It is inconceivable that a person in his position would not know that Grochan was a union official, especially after sitting in negotiations with her for over 2 months and after he received reports that she was soliciting members for the union.

¹⁹ A copy of the letter was also sent to Rose Washington, executive director, who concurred with White's recommendation to replace the switchboard with one receptionist.

¹⁶ *Manno Electric, Inc.*, 321 NLRB 278, fn. 12 (1996).

¹⁷ Respondent orally moved to dismiss the complaint at the hearing on the grounds that the General Counsel had not satisfied its initial burden of persuasion. The motion was denied and I reaffirm my ruling for the reasons stated below. On October 18, 1996, the Respondent filed a motion to reopen the record in light of new discovered evidence

that not more than 2 weeks after White prepared the letter, Grochan was advised that she would be laid off, effective September 30, 1995.

I find that White knew of Grochan's prounion activity, which made him anxious at a time when the Respondent was undergoing a major reorganization. I also find that White's recommended decision to replace the switchboard function with one 40 hour receptionist, rather than two 30-hour receptionists, was motivated by Grochan's prounion activity.

Sherry Gallup, Grochan's immediate supervisor, also knew that Grochan was actively encouraging bargaining unit employees, particularly the secretaries in her department, to join the union and get involved. Gallup likewise had received reports from secretaries that Grochan was urging them to attend union meetings. Her February 1996 memo establishes that Gallup was aware of Grochan's union activity and that she viewed Grochan's action with disfavor.

Gallup also knew first hand that Grochan practiced what she preached. Between February 14, 1994 (the date Grochan joined the union), and August 15, 1995 (the date she was told that she was being laid off), Grochan filed no less than six grievances. All of which, except one, resulted from actions taken or decisions made by Gallup. All of which were resolved in Grochan's favor by higher-level management, that is, Gallup's superiors. Gallup's increasing frustration with Grochan's tenacity is embodied in Grochan's annual evaluation in November 1994. In that document Gallup explains how "frustrated" she felt because Grochan had filed so many grievances thereby taking these matters outside the department. The 1994 annual evaluation further establishes that Gallup viewed Grochan's protected activity with disfavor.²⁰

At the hearing Gallup sought to minimize her involvement in preparing the 1994 annual evaluation, when she testified that her first draft of the evaluation did not contain any references to the grievances. Rather, she said that the reference to the grievances was inserted by her supervisor, Al Hammerling.²¹ I do not credit Gallup's testimony in this connection. It was Gallup, not Hammerling, that was always being taken to task by Grochan.²² It was Gallup, not Hammerling, whose decisions were being overturned by higher management. It was Gallup, not

Hammerling, who had to go out of her way to accommodate Grochan in order effectuate the resolution of the grievances. When the question was put to her, Gallup could not explain why Hammerling would have added the grievance language, even though she must have discussed it with Hammerling at the time it was added or shortly thereafter, when Grochan insisted that it be removed.²³

In sum, the evidence persuasively establishes that the Respondent, through White and Gallup, knew of Grochan's protected activity, which was viewed with disfavor, and which resulted in her lay off and the refusal to consider her for rehire. The burden therefore is upon Respondent to persuasively establish that the same actions would have taken place even in the absence of Grochan's protested activity.

2. The Respondent's motivation for the decision to lay off Grochan

The Respondent argues, and the evidence reflects, that regardless of Grochan's union activity, the switchboard operations would have been abolished. I agree. That decision was brought about by an anticipated decline in revenues and an interest in operating in a more cost effective manner. Technological advances had enabled the Respondent to begin moving in that direction almost a year before the layoffs when it purchased an automated telephone system and leased a voice mail package.

The real issue, however, is whether the decision to lay off Grochan rather than create two 30-hour receptionists (Scarpinato and Grochan) would have been the same had it not been for Grochan's protected activity. The Respondent never really answers this precise question. Instead, it asserts that it chose one 40-hour receptionist because it was the least expensive alternative. Contrary to the impression that the Respondent seeks to foster, the evidence establishes that the cost savings between one 40-hour receptionist and two 30-hour receptionists was not particularly significant (\$7390) in view of the overall goal of saving \$1.3 million. In other words, the monetary incentive to choose one option over the other was not overwhelming.²⁴

²⁰ Respondent argues that the grievances should not be considered because they are remote in time from the filing of the charge and complaint. I do not agree. The grievances are not the underlying bases for the charge or complaint. Rather, they are evidence of a continued pattern of protected activity by Grochan which Gallup disfavored. Considered in that context, along with Gallup's termination report and the February 1996 memo, the evidence supports an inference of animus.

²¹ Even though Hammerling is still employed by the Respondent in a mid-level management position, he was not called to corroborate Gallup's testimony or to explain the actions attributed to him. I find that the failure to call Hammerling to testify warrants an adverse inference that his testimony would not have supported Gallup's version of what occurred. *Guardian Industries Corp.*, 319 NLRB 542 (1995).

²² Gallup also attempted to dismiss any notion that she was irritated by the grievances. She stated that she did not personally blame Grochan for filing grievances because it is the quickest way of getting a problem resolved. That testimony certainly does not mesh with what she wrote in the 1994 annual evaluation.

²³ In an effort to downplay Gallup's frustration with Grochan because of the latter's aggressive protected activity, the Respondent sought to cast Grochan as a disgruntled employee, who did not get along with her coworkers. There is little evidence to support that position. The fact that Grochan unsuccessfully applied for other jobs with Respondent does not necessarily establish job dissatisfaction. It may simply suggest her desire to explore the possibility of getting ahead. Further, the only evidence of a work-related problem with another employee surfaced in early 1994, when Scarpinato, the second-shift switchboard operator, failed to relieve Grochan in a timely manner. That problem was resolved, once and for all, at the February 14, 1994 meeting. As to any other employees, no evidence was presented to show that Grochan was unable to work with her coworkers.

²⁴ Respondent also asserts that if Scarpinato had turned down the 40-hour receptionist position, it would have been offered to Grochan. The argument is self-serving and does not answer the question at issue of why two 30-hour receptionist positions were not created in the first place. The Respondent further asserts that it ultimately did offer Grochan a 30-hour receptionist position which she rejected because she wanted Scarpinato's 40-hour position. There is no evidence, however, that such an offer was actually communicated to Grochan's union rep-

In addition the decision to layoff Grochan, rather than create a 30-hour position for her, was inconsistent with the Respondent's efforts to minimize the impact of the restructuring on the bargaining unit. Unlike so many other employees slated to be laid off, who were given new jobs, the Respondent made no effort to retain Grochan as an employee.

Finally, the timing of the decision to layoff Grochan, instead of creating two 30-hour receptionist positions, calls into question the Respondent's true motivation for making that decision. While White was developing various scenarios for replacing the switchboard operations, he received a report that Grochan was urging employees to join the Union during working hours. At the same time he rejected the option of having two 30-hour receptionists, White prepared a warning letter to Grochan for conducting union activity during working hours. About 2 weeks after White sought to send that letter, Grochan was notified that she was being laid off. The timing of these decisions further supports an inference that Grochan would not have been laid off had it not been for her union activity. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act when it laid off Grochan.

3. The reasons why Gallup refused to consider Grochan for a grade 3, residential secretary position

Gallup did not interview Grochan for the residential secretary position. She did not even acknowledge her application. Judging from the termination report, it is safe to say that Gallup did not want the Respondent to rehire Grochan for any job, regardless of whether she was qualified or not. The Respondent nevertheless argues that there was no need for Gallup to interview Grochan for the secretarial job because she had twice before interviewed her for the same position in April 1991 and February 1994. The Respondent asserts that from these prior interviews Gallup had concluded that Grochan was not a team player (i.e., that she was unable to work with other employees). The evidence does not support the argument.

First, there is no evidence that Grochan was not a team player in the sense that she could not work with other employees. Certainly Gallup's testimony did not establish this point. When asked to explain what she meant when she said that Grochan was "not a team player," Gallup flip-flopped. First she said that Grochan was not a team player because she was out for herself and was not cooperative. In almost the same breath, however, Gallup conceded that Grochan was "always willing to help out at anytime. Always" and that Grochan was always willing to go the extra mile to make sure things ran smoothly. That certainly does not sound like someone who is not a team player. Although it was difficult for Gallup to admit, she eventually conceded that while Grochan was always willing to help out, she always seemed to question and challenge directions—Gallup's directions. The evidence tends to show that Gallup resented Grochan's use of the grievance procedure to question her authority.

Next, there is no evidence to support the Respondent's assertions that Gallup reached her conclusion in the two prior inter-

views, long before Grochan joined the union and began filing grievances. Gallup's testimony on this point is contradicted by Grochan's 1992 and 1993 annual evaluations which clearly disprove any notion that she was unable to get along with her coworkers or Gallup. Contrary to her testimony, Gallup wrote in the November 1993 evaluation that working with Grochan was a positive experience. She praised Grochan for being outgoing and polite with a great sense of humor. That was only 2 months before the February 1994 interview. There is no evidence that their rapport changed in between. At the very best, the first inkling of friction arose in the February 14, 1994 meeting with Scarpinato; however, there is no evidence that the meeting took place prior to the second interview. After the meeting, the problem with Scarpinato was resolved, once and for all, leaving nothing to support the notion that Grochan had difficulty working with other employees.

The Respondent further argues that Gallup did not need to interview Grochan because she knew from the April 1991 interview that Grochan's typing skills were not "up to snuff." In this connection, Gallup's testimony can be summarized as follows. Even though Grochan had performed poorly on a typing test 3 years earlier, she did not require Grochan to take another typing test in February 1994 because Grochan said she was tired. Not only that, Gallup did not even discuss Grochan's typing abilities in the interview. After going over the job with Grochan, Gallup told her to go home and think about what they had discussed. Gallup's testimony on this point simply does not add up. If Grochan had performed poorly on a typing test 3 years before, there certainly was good reason to test her again, especially since the switchboard operator position did not require typing. If Grochan's typing was poor, there would have been every reason to discuss her typing skills in the interview. And if Gallup truly had arrived at the conclusion that Grochan was not a team player by the second interview, there would have been no reason for her to tell Grochan to go home, think about the job, and let her know whether she was still interested.

The Respondent further asserts that the failure to interview Grochan was of no consequence in any event because she was not qualified for a secretarial position. In addition to the argument that Grochan did not perform well on a typing test, it points out that Grochan had not held a secretary position for several years and had been turned down for several secretary positions with the Respondent over the years. While this is true, I do not attach great significance to this argument for several reasons. First, the evidence establishes that Grochan did work as a secretary prior to working for Respondent and therefore did possess some secretarial experience. Even Gallup conceded that the mistakes made by Grochan on her typing test could have been corrected in time with practice. Second, unlike the grade 3, residential secretary position (an entry level position), the other secretarial positions for which Grochan applied were grade 5 or above, which required the skills of a more experienced secretary. It is not surprising that a candidate more qualified than Grochan was selected for these positions. Finally, and most important, Grochan testified that in 1994, she was offered a secretarial position in the personnel department, which she turned down because she did not want to leave the bargaining unit. I credit her Grochan's testimony on this point,

representative or that he communicated such an offer to Grochan. Also, there is no evidence that Grochan rejected such an offer or that she rejected it because she wanted Scarpinato's 40-hour position.

which was un rebutted. The evidence taken as a whole therefore establishes that Grochan possessed at least the minimum qualifications for a secretarial position.

When a Respondent's reasons are determined to be false, the circumstances may warrant an inference that its true motives are unlawful and that the Respondent is attempting to conceal to them. *Fluor Daniel, Inc.*, supra. I find that the reasons for not considering Grochan for the grade 3, residential secretary position, are pretextual.²⁵ Gallup's testimony is internally inconsistent and contradicted by the other evidence. Had it not been for Grochan's protected activity, she would have been given at least the same consideration for the job that she received in February 1994 and April 1991 (i.e., an interview and a typing test). I find that the Respondent violated Section 8(a)(3) and (1) of the Act when it failed to consider Grochan for the grade 3, residential secretary position.²⁶

4. Grochan's procurement of White's July 27 letter

Respondent argues that even if its treatment of Grochan violated Section 8(a)(3), she is not entitled to reinstatement or backpay because she dishonestly opened and read mail addressed for management officials. At issue is White's July 27 warning letter to Grochan which was not given to her upon the advice of Respondent's counsel. Copies were trifoldd and inserted in envelopes individually addressed to Washington, Walsh, Stodden and Gallup. The sealed envelopes were placed

in intra-agency mail at the switchboard. Grochan testified that while sitting at the switchboard, she held one of the envelopes up to the window light and read its contents. I do not credit her testimony on this point. Respondent amply demonstrated that it was not possible for Grochan to read the letter without opening an envelope. The only other permissible inference that can be drawn is that Grochan improperly obtained the information, which was intended to be kept confidential, and sought to conceal the truth, when she testified at the hearing. I therefore find that Grochan forfeited her right to backpay and reinstatement. *Canyon Ranch, Inc.*, 321 NLRB 937 (1996), *Uniform Rental Service, Inc.*, 161 NLRB 187, 190 (1966).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The union is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Beverly Grochan because of her protected activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By failing and refusing to consider Beverly Grochan for the grade 3, residential secretary position, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

However, I shall not order Grochan's reinstatement with backpay. By improperly opening a sealed envelope addressed to a management official, which was intended to be confidential, and reading the contents inside, Grochan forfeited her right to backpay and reinstatement.

[Recommended Order omitted from publication.]

²⁵ With respect to the other two jobs for which Grochan applied, I find, upon the credible testimony of James Morgan, that Grochan was properly considered for the grade 5, secretary-outpatient position and that the decision not to hire her for this position was not influenced by her protected activity. With respect to the grade 12, secretary/administrative assistant position in the human resources department, there is no persuasive evidence that Grochan was not considered for this position because of her protected activity nor is there any evidence that she met the minimum qualifications for this job. I therefore find no violation of the Act with respect to these two positions.

²⁶ I further find that the Respondent violated Sec. 8(a) (3) and (1) of the Act by its refusal to consider Grochan for the grade 3, residential secretary position, which was filled on June 27, 1996, by Abby Hermance, who was hired by Gallup from outside the Respondent.